6821

No. 806. 28th 46

Brf. of Miller & McLoughlin for Pet.

Office Supreme Court U. S.
FILED
MAY 1 1899
JAS. H. MCKENNEY,
Clerk.

Filed May 1st, 1899.

Supreme Court of the United States,

OCTOBER TERM, 1898.

EX PARTE THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, CREATED BY THE LAWS OF THE STATE OF LOUISIANA, PETITIONER.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

BRANCH K. MILLER,
JAMES J. McLOUGHLIN,
Solicitors for Petitioner.

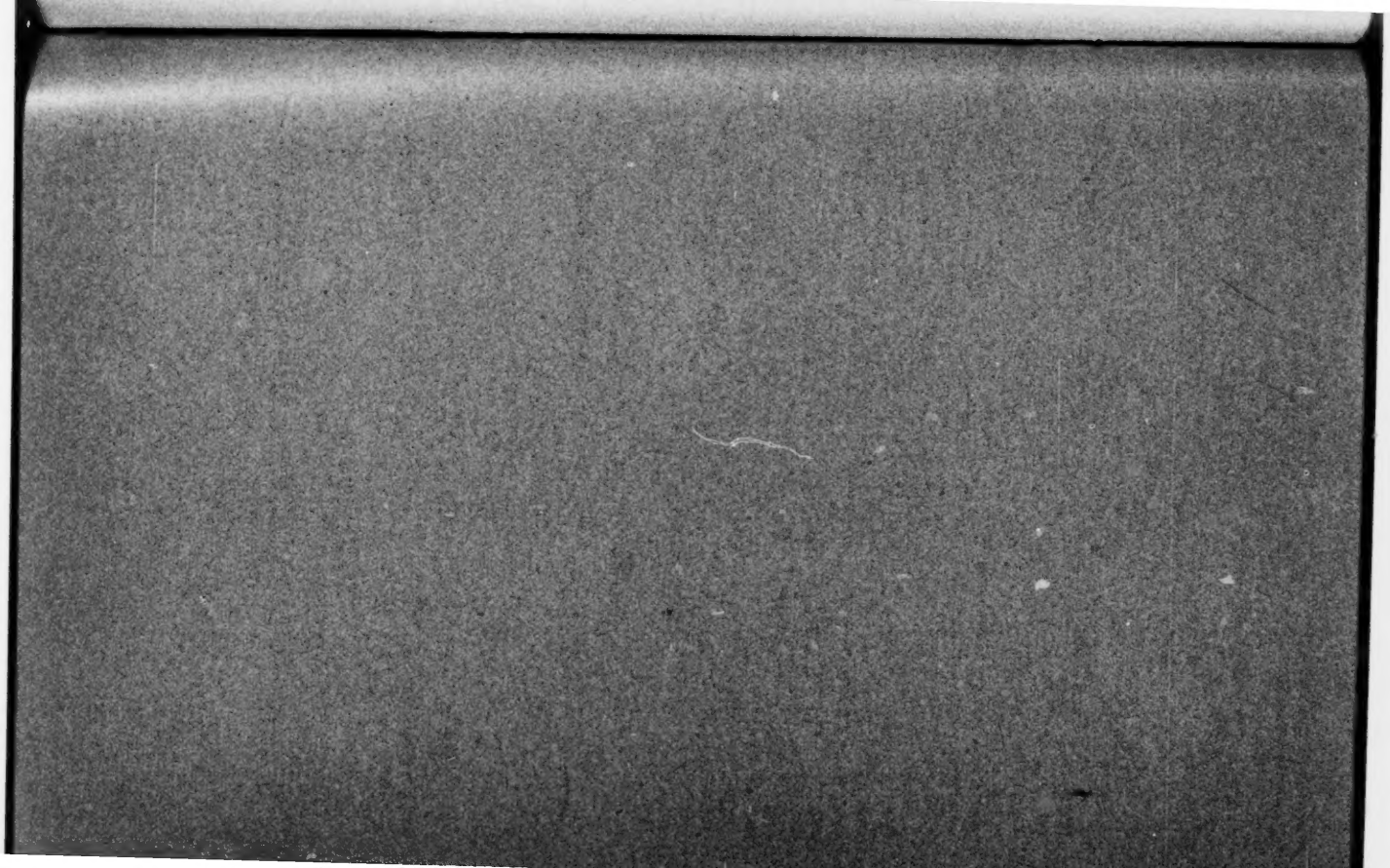
APRIL, 1899.

Filed _____ 1899.

_____

Clerk.

A. W. Hyatt Stety'Mfg Co., N. O.—30191.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1898.

EX PARTE THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, CREATED BY THE LAWS OF THE STATE OF LOUISIANA, PETITIONER.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

SYLLABUS.

Under section 5 of the act of Congress of March 3d, 1875 (18 Statutes at Large, p. 170), it is the duty of the Circuit Court to stop all further proceedings in, and to dismiss any suit, in which it shall appear at any time after the institution of the same, that the parties have been improperly or collusively made or joined, either as plaintiff or defendants; such fact may be brought to the notice of the court by the defendant, by a plea in abatement, by the answer, by affidavit, or otherwise; the time when such may be done is not restricted; such objection may be taken at any time, pending the suit; if the court should acquire knowledge of such facts, without the action of any party to the suit, or even if the parties should consent to proceed with the case, notwithstanding the want of jurisdiction, it is the duty of the court, of its own motion, in such case, to deny its own jurisdiction, and dismiss the suit. Williams vs. Nottowa, 104 U. S. 211; Farmington vs. Pillsbury, 114 U. S. 144; Hartog vs. Memory, 116 U. S. 588-591; Morris vs. Gilmer, 129 U. S. 325; Shreveport vs. Cole, 129 U. S. 36-44; Mansfield, Coldwater, Etc., R. R. vs. Swan, 111 U. S. 382; Nashua R. R. vs. Lowell R. R., 136 U. S. 374; Anderson vs. Watt, 138 U. S. 701; Lehigh Co. vs. Kelly, 160 U. S. 337.

It was error for the lower court to strike from its files a plea of defendant, setting up that complainant, suing as an alien, was not an alien, but a citizen of the same state as defendant, and to refuse to allow the filing of another such plea to the same effect, although such plea was tendered after issue had been joined by an answer, a reference to, and report by, a master, and exceptions filed to the report.

The conditions stated in the preceding paragraph do not constitute a case which, under section 5 of the act of March 3d, 1881, can be reviewed on the question of jurisdiction by the Supreme Court alone; in the case stated, the jurisdiction was not "in issue;" it was an effort to create or form such issue, which was prevented or not permitted, by the action of the court.

Interest on taxes, imposed as a penalty for delinquency, or as an inducement for prompt payment, is not an accessory of the taxes, nor a part thereof; the right to such tax does not carry with or include in it a right to such interest. Slack vs. Ray, 26 La. An 675; State vs. Fire Insurance Co., 41 La. An. 142; McChesney vs. People, 99 Ills, 219; People vs. Smith, 94 Ills. 226; Silsbee vs. Stockle, 44 Mich. 576; F. & P. M. Ry. vs. County Treasurer, 32 Mich. 260; Scammon vs. Chicago, 44 Ills. 269; Nance vs. Hopkins, 10 Lea (Tenn.), 508; Myers vs. Park, 8 Heiskel (Tenn.), 550; Desty on Taxation, vol. 2, p. 754.

Of the numerous grounds for the relief herein sought, set out in the petition, it is deemed sufficient for the purpose of this application, to bring specially to the notice of the court, only those set out below, to-wit:

1st. That the court erred in not reversing the decree of the Circuit Court, on account of the error of that court, in striking from the records of the cause, the pleas of defendant, denying the jurisdiction of the court, filed June 29th and July 1st, 1897, and its refusal to allow defendant to put such jurisdiction at issue, by a plea tendered for filing December 20th, 1897.

On July 1st, 1897, defendant filed in the Circuit Court a plea in in abatement, setting up that Mrs. M. M. Fisher, complainant, described in her bill as a citizen of the Kingdom of Spain, was, in fact, a citizen of the State of Louisiana, residing in the city of New Orleans; that the defendant was also a citizen of the State of Louisiana, and hence, the court was without jurisdiction of the cause; on motion to that effect, the Circuit Court, on December 20th, 1897, after hearing, ordered that the plea in abatement be taken from the files, (see Record, pp. 40 and 52); on the same day defendant tendered for filing, a plea to the original and supplemental bills, denying the jurisdiction of the court, on the same grounds set up in the plea filed July 1st, (see Record, p. 49), which said plea the court then and there, after hearing counsel for both parties, refused to allow to be placed of Record. (Record, p. 51).

This latter plea, set out that the facts upon which it was based, were not discovered until the exceptions had been filed to the master's report, although diligent search to discover the same had been previously made, through the Secretary of State, and the Consul General at Havana, Cuba; it further set out that the complainant's repre-

sentation of her spanish citizenship was for the purpose of acquiring jurisdiction herein by a fraud upon the court; that the defendant, in demurring and in answering in the cause, was ignorant of the fact that complainant was practicing and had practiced a fraud upon the Circuit Court, to obtain its jurisdiction; that defendant was mislead by the said fraud and misrepresentation, and that equity required that it be permitted to withdraw, or to treat as withdrawn, the demurrer and answer theretofore filed, and to place of record its said plea to the jurisdiction (see record, p. 49, *et seq*).

It may be inferred that the plea filed July 1st, was stricken from the record on the ground, that there was not affixed to the same the usual certificate of the solicitor; (see Petition for Rehearing, par. 11, record, p. 136); the plea, however, offered for filing December 20th, 1897, is not amenable to this objection, supported, as it is, by a certificate of defendant's solicitor, declaring that, in his opinion, the plea is good in law.

It is respectfully submitted, that there was error in the Circuit Court in striking the plea first named, from the Record, in refusing to allow the filing of the plea, and, also, in any event, in failing, then and there, *ex proprio motu*, to investigate the alien citizenship *vel non* of complainant.

Section 5 of the act of Congress of March 3d, 1875 (18 Stat., p. 470), provides:

"That, if in any suit commenced in a Circuit Court, or removed from a state court to a Circuit Court of the United States, *it shall appear*, to the satisfaction of said Circuit Court, *at any time*, after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy within the jurisdiction of said Circuit Court, or that *the parties to said suit have been improperly or collusively made or joined, either as plaintiff or defendants, for the purpose of creating a case cognizable* or removable under this act, the Circuit Court *shall proceed no further therein*, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require, * * * ." (Italics ours.)

This points out with unmistakable clearness the duty of the court under the circumstances named.

Concerning this section, it has been said: "In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, *and imposes the duty on the court, on its motion, without further waiting for the parties*, to stop all further proceedings, and dismiss the suit, whenever anything of the kind appeared. This was for the protection of the court, as well as the parties, against frauds upon its jurisdiction, for it was very properly said by Mr. Justice Miller, speaking for the court, in Barney vs. Baltimore (supra), that such transfers for such purposes are frauds upon the court, and nothing more." Williams vs. Nottawa, 104 U. S. 211.

Speaking of the application of the act of 1875, in Farmington vs. Pillsbury, 114 U. S. 144, this court said:

"To protect the courts, as well as parties, against such frauds upon their jurisdiction, it was made the duty of the court, at *any time when it satisfactorily appeared*, that the suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, or that the parties had been improperly or collusively made or joined, * * * for the purpose of creating a case cognizable under that act, *to proceed no further therein, but to dismiss the suit*, or to remand it to the state court from which it had been removed. This, as was said in Williams vs. Nottowa, 104 U. S. 209-211, imposed the duty on the court, of its own motion, without waiting for the parties, to stop all further proceedings, and dismiss the suit, the moment a fraud on its jurisdiction was discovered. The old rule established by the decisions, which required all objections to the citizenship of the parties, unless shown on the face of the record, to be taken by plea in abatement, before pleading to the merits, was changed, and the courts were given full authority to protect themselves against the false pretenses of parties. This is a salutary provision, which ought not to be neglected; it was intended to promote the ends of justice, and is *equivalent* to an express enactment by Congress that the Circuit Courts *shall not have jurisdiction of suits which do not really and substantially involve a dispute or controversy of which they have cognizance, nor of suits in which the parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable under the act.*" (Italics ours.)

In Morris vs. Gilmer, 129 U. S. 325, speaking of the duty of dismissing a suit under the act of 1875, the court declared:

"It is true, that by the words of the statute this duty arose only when it appeared to the satisfaction of the court, that the suit was not one within its jurisdiction, but if the record disclosed a controversy, of which the court cannot properly take cognizance, its duty is to proceed no further, and to dismiss the suit, and its failure or refusal to do what, under the law, applicable to the facts proved, it ought to do, *is an error, which this court, upon its own motion, will correct*, when the case is brought here for review; this rule is inflexible, and without exception, as was said, upon full consideration, in Mansfield, Coldwater, etc., R. R. vs. Swan, 111 U. S. 379-382, which requires this court of *its own motion to deny its own jurisdiction*, and in the exercise of its appellate power, that of all courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record, on which, in the exercise of that power, it is called upon to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to answer for itself, even were it not otherwise suggested, and without respect to the allegations of the parties,

* * * * * * * * * * * * *

and *the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court;* it may *be done upon affidavits, or the depositions taken in the cause may be used for that purpose;* however done, it should be upon due notice to the parties to be affected by the dismissal." (Italics ours.)

In Nashua R. R. vs. Lowell R. R., 136 U. S. 374, speaking of a question of jurisdiction arising under section 5 of the act of 1875, it was said:

"By this statute *the time at which such objection may be raised* is not thus" (as it was prior to the adoption of such act) "restricted, but it *may be taken at any time after suit brought* in the case mentioned.

"The principal object of the statute was to relieve the national courts from the necessity of passing upon cases, where it was plain that no question was involved within their jurisdiction, and thus free them from consideration of controversies of a frivolous and questionable character, and to prevent fraudulent and collusive attempts to invoke the jurisdiction of those courts, as had frequently been the practice, by collusive transfers of property or choses in action, by a citizen of one state to a citizen of another, to enable the latter to go into those courts, the original owner still retaining an interest in the property or choses in action transferred, or taking a contract of retransfer of the same to himself, after the termination of the litigation. In such cases, it is undoubtedly *the duty of the court below, of its own motion, to deny its jurisdiction*, and of this court, on appeal or writ of error, to see that that jurisdiction has in no respect been thus imposed upon. Moris vs. Gilmer, 129 U. S. 315; Farmington vs. Pillsbury, 114 U. S. 138-143." (Italics ours).

"Under the act of March 3d, 1875, determining the jurisdiction of Circuit Courts of the United States (18 Stat. 470-472), the objection to the jurisdiction, upon a denial of the averment of citizenship, is not confined to a plea in abatement, or a demurrer, but may be taken in the answer, and the times at which it may be raised are not restricted; although the averment as to citizenship may be sufficient, yet, if it appear that that averment is not true, it is the duty of the Circuit Court to dismiss the suit, and this court, on appeal or writ of error, must see to it that the jurisdiction of the Circuit Court has in no respect been imposed upon. Anderson vs. Watt, 138 U. S. 701; Morris vs. Gilmer, 129 U. S. 315-325; Nashua R. R. vs. Lowell R. R. 136 U. S. 356-374; Cameron vs. Hodges, 127 U. S. 322-325."

See, also, Shreveport vs. Cole, 129 U. S. 36-44; also, Lehigh Mining and Manufacturing Co. vs. Kelly, 160 U. S. 339, *et seq.*, wherein it is stated particularly, that the fifth section of the act of 1875 was not superseded by the act of 1887, amended in 1888.

In Hartog vs. Memory, 116 U. S. 588-591, it was held, that the evidence upon which the Circuit Court acts in dismissing a suit for want of jurisdiction, must not only be pertinent to the issue made by the parties, or to the inquiry instituted by the court, but it must also appear of record, if either party desires to invoke the jurisdiction of this court, for review.

If this rule were applied here, it might be well doubted whether the rules announced by the cases cited were pertinent, since, as a matter of fact, the citizenship of complainant was not put at issue by the answer, and not sought to be raised otherwise than by pleas tendered after the answer was placed of record, and the master's report filed; but in view of decisions of this court subsequent to that in Hartog vs.

Memory, it would seem that it was not material how or when the attempt was made, to bring to the notice of the court its lack of jurisdiction; for instance, in Morris vs. Gilmer, 129 U. S. 326, it was contended that the defendant had precluded himself from raising the question of jurisdiction by inviting the action of the court upon his plea of former adjudication, and by waiting until the court had ruled that plea to be insufficient in law; and in support of this petition, Hartog vs. Memory was cited; the court, after declaring that it had held the same in Metcalf vs. Watertown, 128 U. S. 586, said, that whether the Circuit Court had or had not jurisdiction, was a question which this court must examine and determine, even if parties forbear to make it, and consent that the case be considered upon its merits; that the court, in Hartog vs. Memory, certainly did not intend to modify or relax the rule announced in previous well considered cases; that in that case, the Circuit Court had summarily dismissed the action, upon the ground solely of want of jurisdiction, without affording the plaintiff any opportunity whatever to rebut or control the evidence, upon the question of jurisdiction; that the failure, under the peculiar circumstances disclosed in that case, to give such opportunity, was of itself sufficient to justify a reversal of the order dismissing the action, and that what was said, was irrelevant to the determination of that question, was unnecessary to the decision, and could not be regarded as authoritative.

In Nashua R. R. vs. Lowell R. R., 130 U. S. 373, it was declared, that while, under the earlier legislation and practice, the question of jurisdiction could be raised only by a plea in abatement, or demurrer, and not by answer, that this rule was modified by the act of 1875, and that (p. 374), under that statute, the time at which such objection might be raised was not thus restricted, but that it might be taken at any time after suit brought in the cases mentioned.

In Anderson vs. Watt, 148 U. S. 701, it was held, that an objection to the jurisdiction, upon a denial of the averment of citizenship, is not confined to a plea in abatement, or a demurrer, but might be taken in an answer, but that the time within which it might be raised was not restricted.

In Lehigh Mining & Manufacturing Co. vs. Kelly, 160 U. S. 337, the court, of itself, without its action being invited by any party to the suit, noticed the want of jurisdiction in the Circuit Court, declaring that the presumption *in every stage* of a cause brought in a federal court being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record.

While some of the above cases dealt with a state of facts in which there was a collusive assignment to a party possessing the citizenship requisite to maintain a suit in the Circuit Court, from another party or parties not thus qualified, it is respectfully sub-

mitted that the rule they announce, is equally applicable to the case of a plaintiff possessing the same citizenship as a defendant, falsely representing himself to be an alien.

It may be said that the court cannot consider the question of jurisdiction in this proceeding, for the reason that under section 5, of the act of March 3d, 1891 (26 Stat. 826), appeals or writs of error from the Circuit Court are direct to this court, and not the Court of Appeals, in any case in which the jurisdiction of the court is "in issue;" the reply to this is, that it appears from the record of the present case, that the jurisdiction of the Circuit Court was never made an issue; that the court declined to entertain any plea of the defendant, setting up a want of jurisdiction; that the Circuit Court rendered no decree, either affirming or denying its jurisdiction; that in order for this court to review the judgment of the lower court upon the question of jurisdiction, obviously the latter must, in some form, have rendered judgment either affirming or denying the same; the conditions in the Circuit Court must be such that either plaintiff or defendants could have appealed from a judgment on the plea in abatement, the defendant could not have pursued the course pointed out in Jahn vs. United States, 155 U. S. 109, because there was no order or decree of the Circuit Court affirming its jurisdiction, which it could have brought to this court by appeal, while carrying the case for all other purposes of appeal, to the Court of Appeals; had it done so, there would have been no order or decree, interlocutory or otherwise; which this court could either have affirmed or reversed; the action of the Circuit Court which is here complained of was its order of December 20th, 1897, striking from the files of the court, its plea in abatement, denying the jurisdiction of the court, on the ground that the plaintiff was a citizen of the State of Louisiana, filed July 1st, 1897, and its order of December 20th, 1897, refusing the application to file a plea setting up the want of jurisdiction, on the same grounds.

Evidently, this was not a case in which the jurisdiction of the court is in issue, in the sense of section 5 of the act of 1891; it was the refusal of the court to allow such an issue to be made, which is here complained of.

It may be well doubted whether the present suit is ancillary to the suit mentioned in the bill, in which complainant had already recovered judgment in the Circuit Court; while its ultimate effect, if successfully maintained, would be to enforce or execute the judgment in that case, the bill seeks a like satisfaction of two other judgments, both of which were rendered by the Civil District Court for the parish of Orleans; the judgment first mentioned was at law; (R., p. 60); the present suit is not between the same parties as the original one, the city of New Orleans here being added as a co-defendant; it does not relate to the subject-matter of the original proceedings, which was

the ascertainment and liquidation of the sum owing by the School Board to complainant, while here, it is sought to establish an indebtedness by the city to the School Board, out of which complainant demands payment.

But even if the present suit be considered ancillary to the original one, in which complainant obtained a judgment at law in the Circuit Court, the jurisdiction of the first case, could be attacked here as effectively as it could have been in the former suit; Lawrence Manufacturing Co. vs. Janesville Mills, 138 U. S. 552-561; Gay vs. Parpart, 106 U. S. 679.

The plea in abatement, tendered on December 20th, 1897, for filing (Rec., p. 49), expressly charged that at the time she instituted her original suit, No. 12,060 of the Circuit Court, complainant was a citizen of the state of Louisiana; it appears that as a matter of fact, complainant, Mary Fisher, born Blackadder, was a native of the State of Virginia, and had lived in the city of New Orleans for thirty-eight years (Rec., p. 125); that John Fisher, her husband, was born in Scotland, and came to the United States in 1859; that on January 31st, 1896, he declared, in the Circuit Court of the United States, his intention of becoming an American citizen, and that he further intended to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereign whatever, particularly to the queen of Great Britain and Ireland. (Rec., p. 142).

It would also appear, from the affidavit of Fisher himself (Rec., p. 142), "that he had lived in the United States since 1859; that he was a machinist by trade, and that by reason of his occupation, he was called (occasionally by the necessities of his business) to the island of Cuba, at different periods since 1861." (Rec., p. 142.)

By article 185 of the constitution of Louisiana, of 1879, in force on May 11th, 1896, when the present suit was filed, it is provided that, among others, every male person of foreign birth who may have legally declared his intention to become a citizen of the United States, should be an elector, and entitled to vote at *any election* of the people; this would qualify Fisher to vote at an election for a member of Congress, the qualifications of such elector, being the same as those required for electors of the most numerous branch of the state legislature; by article 22 of the same constitution, any elector under the same is declared to be eligible to a seat in the House of Representatives, and if over twenty-five years of age, eligible to the Senate; save that he had not been ten years a citizen of the United States, by which is meant his qualification to vote for members of Congress, and to hold office, he would have been eligible, under article 60 of the State constitution, for governor or lieutenant governor.

The right to vote and to hold office, however, is not necessary to constitute citizenship in the sense of the acts of 1875 and 1888; "a

citizen, in the sense of the statute, is one who resides in and is an inhabitant of the state. It is evident that he need not possess the qualifications which would enable him to exercise the elective franchise, or hold real estate." Garland & Ralston's Federal Practice, section 125.

2d. The Court of Appeals erred in amending the judgment of the Circuit Court, so as to allow interest upon the suit for which the decree was entered, from January 24th, 1881, instead of allowing the decree of the lower court to remain unchanged in this particular; this allowed interest only from February 21st, 1898; it will be noted that this change would allow interest for seventeen years more than was awarded by the Circuit Court; this would nearly double the amount of the latter.

The following facts are relied upon to sustain this assignment, and the complaint thereunder made.

After the entry of the decree of the Circuit Court, defendant, by appeal, without supersedeas, carried the case for review to the Court of Appeals; subsequently, the complainant filed a cross-appeal; shortly after the decree of the Circuit Court became final and executory, and before taking their cross-appeal complainant, and the intervenors, whose claims had been recognized by the Circuit Court, took steps to have the decree executed, and the amount it awarded to them, paid and discharged; this they proceeded to do by the institution in the Circuit Court, of a suit in which they prayed for a mandamus against the Board of Liquidation of the City Debt, a corporation created by Act 133, of 1880, and the several acts amendatory thereof, charged with the exclusive control and direction of all matters pertaining to the judgment and bonded debt of the city of New Orleans; its duties are prescribed, and its powers defined, by the said act of 1880, Act 67, of 1884, Act 110, of 1890, and the constitutional amendment proposed bp the same, and Act 128, of 1890; in the said suit for a mandamus it was set up that plaintiff's decree was one of a class of judgments which it was the duty of said Board to pay and discharge, and there was prayer for a mandamus compelling the Board so to do; the latter set up the defenses which are set out in its answer in the said suit, the Record of which, filed as part of the petition in the present proceeding; there was judgment of the Circuit Court making the mandamus peremptory, and ordering the Board to do as prayed by the petition; this cause, the defendant Board carried by writ of error to the Court of Appeals; it was therein argued and submitted on the same day as the present case, on the appeal of the defendant therein, immediately after the latter was argued and submitted, on the cross-appeal of the complainant and intervenors.

Under these conditions, the Court of Appeals had full cognizance of all of the pleadings, issues and facts disclosed by both records, and

by reason of the relation of one case to the other, knew judicially, and could consider in either case, any knowledge derived from the record of the other; this would necessarily inform the court that the cross-appellants in the suit against the city, had acquiesced in the judgment, which, on their cross-appeal, they were assailing as erroneous, as regards its allowance of interest; the acquiescence was shown by their availing themselves of the power of the Circuit Court to execute the judgment as originally rendered, by enforcing its payment, through the remedy of mandamus.

A party cannot, while affirming the correctness of a decree in this method, simultaneously, especially before the same court, attack it as erroneous; the cross-appeal was taken after the mandamus suit was instituted, which would afford at least some ground for the conclusion that it was an afterthought; in any event, after having set up the entire correctness of the decree of the Circuit Court, which is obviously involved in proceedings for its enforcement, they carried the case to the Court of Appeals on their cross-appeal; all merit of the cross-appeal, if not all basis for it, if any there were, was completely destroyed and taken away by the previous institution of the suit for a mandamus; it is charged in this connection that the Court of Appeals was in error in making any change in the decree of the Circuit Court, to the advantage of cross-applicants, or to the prejudice of the defendants.

3d. The court erred in holding that the interest on the taxes claimed and by the court held to be due by the city, was a part of the taxes themselves, for which the city was accountable to the School Board, and should have paid over to the same, as in case of the taxes themselves.

Under the order of reference (Rec., p. 21), the master found (Rec., p. 25, *et seq.*), that the principal of the school taxes collected by the city from years 1871 to 1878, both inclusive, and not paid over to the School Board, amounted to $23,180.03, and that the proportion of the interest actually collected by the city on taxes of said years, to which School Board was entitled, was $48,758.75; it is complained here, that there was error in the order of reference, so far as it assumed that the city was responsible to the School Board for the said interest, and in the report of the master, finding such liability, and the confirmation by the court of the master's report, so far as concerns the present matter. (Rec., p. 51, *et seq*).

The taxes upon which the interest complained of was allowed, were levied for the years 1871, 1872 and 1873, under section 7, of Act No. 8, of 1871, which requires that the Board of School Directors of the City of New Orleans, immediately upon their organization, and also at the commencement of each year thereafter, should ascertain the amount of funds necessary to carry on the schools under their charge for the current year, and report the same to the Board of Ad-

ministrators of the city of New Orleans, who should, at such time as they might deem necessary, levy the amount on the taxable property of the city, and direct the same to be collected in the manner and at the time by them deemed most desirable; that the time should not exceed six months from the date of their notification of the amount required.

It is apparent from a mere reading of this section, that the amount of the tax levy was to be such as was necessary to carry on the schools, and no more; it was not contemplated that there should accumulate in the hands of the School Board any surplus over and above what was requisite to conduct the schools; the amount of the tax could not exceed what was required for the annual school expenses, ascertained by the School Board, at the commencement of the year; obviously this amount was to be fixed and certain; likewise, as to the tax, which could be levied for such sum, and no more; any interest that might accrue upon delinquent taxes could not be taken into consideration in fixing the amount to be collected, for the reason that the amount to be realized in that form, could not be ascertained in advance with any certainty, and, consequently, not relied upon to supply any portion of the amount, ascertained as requisite to discharge the yearly expenses; the sum to be realized in the form of interest would depend upon the amount of taxes which would become delinquent, and for how long a time they remained in this condition; the longer or shorter the time the delinquency continued, the greater or less would be the accumulation of interest; it was intended that the taxes levied and collected should be precisely the same in amount as the estimated expenses of the year; if the interest were added to the tax provided, this would give the School Board a sum greater than what the law designed that it should have; no proper tax levy could be made which would include any sum on account of interest, as a source out of which the annual expenses were to be paid; for the reasons stated above, that the amount to be realized from such interest would be impossible of estimation in advance, with that degree of certainty which was required; from these considerations it would appear, that it was no part of the purpose of the act of 1871, in providing a revenue to carry on schools, that any part of this should be derived from delinquent interest on school taxes.

The school taxes derived as above, we are informed by section 7, are "to be collected in the manner and at the time by them (the Board of Administrators of the city) deemed most desirable."

While not desiring to base this argument on narrow technical lines, it will be readily admitted that complainant, who sets up an affirmative right to the interest in question, carries not only the burden of proof, but also that of argument, to make it clear, that its claim is well founded; the imposition of interest is usually a penalty

for delinquency, and an inducement for prompt payment; and is also regarded generally as one means of enforcing the collection of taxes; the Board of Aministrators being the governing body of the city of New Orleans, could perform no official act of the kind involved here, save by the adoption of an ordinance; (see section 12, par. 20, Act No. 7, of 1870, the city's charter); the title of the School Board to the interest in question, would depend entirely upon whether it acquired such, by virtue of section 7, of Act No. 8, of 1871; it is only by effect of this that the Board could be entitled to the tax itself, and the interest is claimed here, as an appurtenance, or accessory of the same; the Board has a right to whatever is given to it under section 7, and to nothing more; this vests in the Board the right to all taxes in any event, levied pursuant thereto; it provided nothing as to interest, and hence, unless as a means of enforcing the tax, the city imposed the payment of interest as a penalty for non-payment of the tax when due, there would be none to which the Board is entitled; it was not shown in the court below that the city had pursued any such course, the proof simply being that she had collected the interest, whether under lawful authority or not, not appearing, otherwise than as it might result from the presumption that the city proceeded as authorized and directed by law; therefore, in the present condition of the record, we are justified in saying that while complainant may have apparently established a legal right to whatever was collected by the city of school taxes, in principal, there is an entire absence of any showing of its title to the interest thereon; and hence, confining ourselves to the showing made in the Circuit Court, and consequently in the Court of Appeals, it was not sufficient to award complainant amount more than double the principal in the form of interest.

Moreover, the imposition of penalties for the non-payment of taxes being one of the means employed to enforce their payment, it is not a part of, but entirely extraneous to, and foreign to the tax itself. Nance vs. Hopkins, 10 Lea (Tenn.), 508; Myers vs. Park, 8 Heiskel (Tenn.), 550; Lacey vs. Davis, 4 Mich. 140; and other authorities cited in Desty on Taxation, vol. II, p. 754.

To subject the delinquent to the payment of interest on his taxes is one form of penalty. McChesney vs. People, 99 Ills. 219; People vs. Smith, 94 Ills. 226.

The interest in such case is no part of the tax, but is as separate and distinguishable therefrom, as any other mode of enforcement could be; it is not entirely unreasonable to say, that the city in the present instance, being charged with the duty and burden of collecting the tax, might fairly retain the interest, by the imposition of which, it was intended to coerce payment.

The imposition of penalties for the non-payment of taxes is one of the means employed to enforce payment; it is a remedy differing

in kind, but identical in nature, with the sale of property for the collection of taxes, milder, but in character differing from a sale of the property, only in severity and completeness; the imposition of interest as a penalty is included in the power to tax, which carries with it authority to use all means necessary or useful to accomplish this object.

Slack vs. Ray, 26 La. An. 675.

From this it would appear, that so far from the interest being a part of the taxes, it stands in a relation altogether independent and extraneous to the tax itself; interest, as a means of enforcing collection of taxes, cannot be imagined otherwise than as a separate and independent idea,—a mere agency by which the tax is collected; an independent force exercised in reference to the tax, in character the same as the seizure of property subject to the tax, and its advertisement and sale by the tax collector.

In city of New Orleans vs. Fire Insurance Company, 41 La. An. 142, the right of the city of New Orleans to impose a penalty of two per cent. per month interest on delinquent licenses was questioned; and the power upheld, on the ground that, under a legislative grant to enforce a collection of any taxes due, the city had the authority to impose a penalty, thus referring the imposition of the penalty to the power to enforce collection.

The failure to pay taxes, when due, may subject the party owing the same to the payment of interest thereon in the nature of a penalty.

McChesney vs. People, 99 Ill. 219;

People vs. Smith, 94 Ill. 226.

The penalty of interest cannot be considered a part of the tax.

Silsbee vs. Stockle, 44 Mich. 576;

F. & P. M. Ry. vs. County Treasurer, 32 Mich. 260;

Scannon vs. Chicago, 44 Ill. 269.

While it may be said, that it would be inequitable to permit the city to retain the interest, while there are school creditors unsatisfied, out of the taxes themselves, to which the law referred them for payment, it is a sufficient answer to say that if such be the case, it would signify nothing more, than that the fund provided for the payment of school debts is insufficient; this would afford no ground to apply to the discharge of school obligations, funds which were never intended by law for that purpose; if the interest not paid by the city, has by it been employed to pay its own debts, or of meeting items of necessary municipal expense, it has done what the law permitted it to do, if, by the act of 1871, interest on school taxes was not vested in the School Board; this suit being to establish title to a fund which has been used by the city for its own purposes, it is not enough to show that the city had no right to the interest; to succeed, complain-

ant must further show, in herself, a clear right to the interest ascertained by the city; in this connection, it is significant that the School Board has, for a period extending all the way from eleven to eighteen years, never made any demand or set up any claim, judicially or otherwise, to the interest in question, and in fact, in its answer filed in the present suit, has expressly disclaimed any right, title, or interest thereto or therein; (see Rec., p. 17, *et seq.*); it denies any indebtedness to it by the city of New Orleans, on account of said taxes, and avers that the latter has fully complied with all her legal obligations to the Board.

All school taxes were levied under section 7, of the act of 1871, until Act No. 36, of 1873, went into effect, by section 4, of which the city was required to levy a tax of not less than one-fourth of one per cent. on the taxable valuation of all property in the city of New Orleans, by which a revenue for the support of the schools was obtained for subsequent years, beginning with 1874; it would appear from the language of this section that it was the tax alone, and no part of the interest thereon, which was given for school purposes; the argument presented as to the proper construction of section 7, of the act of 1871, applies with equal, if not greater force, to defendant's contention that, under the act of 1873, it was not intended that the Board should receive anything more than the principal of the tax.

By section 2, of Act 36, of 1873, the Board of School Directors is ordered, in October of each year, to adopt an estimate of debt and expenditure, and communicate the same to the council of the city of New Orleans; by section 3, it is made the duty of the council *to make provision* for the support of the public schools, and *for that purpose* to levy a tax of not less than one-fourth of one per cent. on the taxable valuation of all property in the city; by section 5, is enumerated the revenues of the Board for necessary expenses, and the uses and purposes of the schools, among which is named the annual tax just mentioned; the provisions of this act differ in no essential particular from those of the statute of 1871.

The collection of school taxes, under both laws, is committed to the city; it is not reasonable to suppose that the School Board was intended to profit by any money collected as a means of enforcing the tax; neither the act of 1871, nor that of 1873, directed either the levying or collection for the benefit of the School Boar of a single dollar more than the face of the tax; these statutes determined the rights of the Board, and likewise those asserted by complainant here; whatever title she may have to any part of the school taxes can arise nowhere else than from the two laws in question; these entitled the Board to the face of the tax alone; the council in both instances was to levy the tax, as well as to collect it; and by the ordinance making the levy, the city could have provided the penalty by the imposition of interest,

or not, just as it chose; the acts of 1871 and 1873 simply give the council power to levy the tax, without imposing upon it the duty of including penalties for its non-payment; it was not mandatory upon the council to visit delinquency with the payment of interest; if it chose to do so, it was in order to facilitate the collections by holding out to the taxpayer an inducement to pay promptly; what the School Board was entitled to, is to be found in the statutes, and not in the ordinances; at any rate, in no part of the latter which went beyond what the statutes provided; the interest is collected under the ordinance, and not under the statutes, which make no mention of interest, in consequence of which it is entirely excluded from any amount the Board was entitled to receive from the city.

The court erred, in any event, even if the city were liable to the School Board for the interest on said taxes, to have rendered a decree against her for the same, and this for the reason that she had long since paid over the principal of said taxes, which were received by the School Board in full settlement of all she owed.

The city, in the manner stated, having made a settlement with the School Board, satisfactory to [illegible] accepted by both parties, as a discharge of all that the city owed, and this settlement having remained unquestioned and undisturbed for so many years prior to the institution of the present suit, should not have been reopened and set aside, as is done by the decree herein; the School Board itself, on the showing made by this record, would not be permitted to question the acquittance resulting from its receipt of the taxes in principal, without any claim for interest, and complainant in this respect can occupy no stronger position than her debtor; she seeks to avail herself of an indebtedness, which she charges to be due by the city to the School Board; in a suit by the latter against defendant, the settlement would be a complete defense; the burden of proving the indebtedness averred, is carried by complainant; the answer of the School Board herein (Rec., p. 17, *et seq.*), declaring that the city owed it nothing, and had fully accounted for and paid over to it all school taxes which she collected, would show that, as between the city and the board, there was no question at all that the former owed nothing.

4th. That the court erred in including in its decree the sum of $11,933.00, which is declared by the master's report to be a discount allowed by the city to the tax payers for payment of school taxes, as the bill only asks that the city be compelled to pay the actual amount of cash collected; as she never collected this sum, it is error to hold her accountable for it.

By reference to the prayer of the bill, it will be seen that it demands a full, fair and perfect account of all school taxes *collected* for the years from 1873 to 1878, inclusive; it is true, it further prays for an account of all taxes not collected for want of proper enforcement,

but these manifestly are such only as had been cancelled by tax sales made by the tax collectors, and no amount which the city remitted by way of a discount to obtain settlement.

It is deemed unnecessary to discuss in detail the other grounds upon which this application is based, which are set out in full in the grounds urged, both in the Circuit Court and the Court of Appeals, for a rehearing, and the assignment of errors for the appeal filed in the Circuit Court, all of which are set out in detail and at large in the petition herein, and which it is prayed that this court take and consider in the assignment of errors for this application, and for the hearing on the same, should the writ of certiorari applied for be granted; the court is respectfully asked to consider all of these grounds, which are not mentioned, and in support of which no argument is made in this brief; by the latter circumstance they are not intended to be waived, but, on the contrary, are insisted upon, as valid grounds for the relief herein sought.

Respectfully submitted,

SAMUEL L. GILMORE,
City Attorney,
JAMES J. McLOUGHLIN,
BRANCH K. MILLER,
Solicitors for Petitioner.

APRIL, 1899.